



Republican Policy Committee

Don Nickles, Chairman Kelly Johnston, Staff Director 347 Russell Senate Office Building (202)224-2946

June 5, 1995

Mortal Justice Is Always Unequal — But That Is No Reason To Abandon It

by Ernest van den Haag

Inequality is tolerable, or at least, tolerated, with respect to punishments in general. But abolitionists argue that it is not tolerable with respect to the death penalty because of its greater severity. The argument might lead them to work for equality of punishments. Instead, they work for abolition of the death penalty because, they claim, that equality cannot be attained. They are right. It cannot be, unless murderers oblige us by committing identical murders under identical circumstances and unless they all are prosecuted by the same prosecutor before the same court. There is little doubt that the death penalty is imposed — as are all punishments in any criminal-justice system — in a way that, although not intended to be, may well be regarded as capricious: Luck, or chance, plays a role, and that role cannot be avoided, although it could be reduced. Not that innocent and guilty persons alike are punished. Rather, the system is capricious in that some guilty persons escape and others are punished; and some are punished more than others who are guilty of the same or, perhaps, of a worse crime.

Capriciousness implies that at least some criminals do not get their deserved punishment. Yet we cannot eliminate it altogether. Is capriciousness morally relevant? It may be legally relevant, at times, when courts believe it could have been avoided. But is it morally relevant? Do those murderers who were capriciously selected to be executed become less guilty than they would be if those capriciously spared had been executed too?

Equality is desirable. But justice is more desirable. Equal justice is most desirable, but it is justice that we want to be equal, and equality cannot replace justice. Justice — even if not equal — is better than no justice, however equal. We should do everything possible to arrest and convict every murderer and to sentence him according to what he deserves. But if some (or even many) murderers are not convicted, or are sentenced indulgently, that is no reason for not sentencing others as they deserve. We should never attempt to get more equality by doing less justice.

The Supreme Court has attempted (in *Furman v. Georgia*, 408 U.S. 238 (1972)) to reduce capriciousness in sentencing. But pre-sentencing capriciousness (by the police, by the prosecutor, or because of the evidentiary situation) cannot be avoided; even sentencing capriciousness can, at best, only be reduced. Some murderers are caught; others, equally guilty, are not. Some of those caught are convicted; others, equally guilty, are not: The evidence of their guilt may not suffice, or be admitted. A good attorney, with the right strategy, makes it easier to get away with no penalty, or a lesser one. But it is hard to know

beforehand on which attorney to place one's bets. Prosecutors do have much discretion in indicting and making plea bargains, and different prosecutors will use their discretion differently. Sometimes one participant in a murder is needed to testify about another, who may be sentenced to death. The witness, although equally guilty, may have to be spared to induce his testimony. Two juries may view the same facts differently. And, finally, two courts may decide differently on whether to impose the death penalty. There are many other factors that make any legal proceeding chancy, the outcome capricious. Do these factors, inherent in any criminal justice system, argue for abolishing the death penalty? Or any other penalty? Isn't it better — more just and more useful — that criminals, if they do not have the certainty of punishment, at least run the risk of suffering it? That murderers at least run the risk of execution?

If the guilty and innocent were to risk equally being sentenced to death we should abolish the penalty and indeed the sentencing process. But not even the most radical abolitionists believe that convicts sentenced to death are innocent. Abolitionists merely argue that some murderers, as guilty as others, are capriciously spared: that those among the guilty who actually are executed are selected as though by a lottery. Suppose, then, that — despite every effort to select the worst murderers for execution — the selection remained capricious. Could that be a serious argument against the death penalty (or any penalty)?

But not even the most radical abolitionists believe that convicts sentenced to death are innocent.

I can't see how. Guilt is personal. The guilt of a convict who has been sentenced to death is not diminished because another, as guilty, was sentenced to a lesser punishment or was not punished at all. Equality is desirable. But justice is more desirable. Equal justice is most desirable, but it is justice that we want to be equal, and equality cannot replace justice. Justice — even if not equal — is better than no justice, however equal. We should do everything possible to arrest and convict every murderer and to sentence him according to what he deserves. But if some (or even many) murderers are not convicted, or are sentenced indulgently, that is no reason for not sentencing others as they deserve: We should never attempt to get more equality by doing less justice.

I cannot accept the abolitionists' belief that there is not a crime horrible enough to deserve capital punishment. On the contrary, there are far more crimes that do than there are death sentences. All the more reason not to spare the few who do receive it. Nor do I believe that we can secure the lives of our citizens — the paramount task of any government — by assuring those who are inclined to murder that, should they be caught, they can nevertheless rest secure, knowing that what they did to their victims never will be done to them, that they will die a natural death, even though they may spend long years in prison.

Staff Contact: Lincoln Oliphant, 224-2946

[Source: This paper is an excerpt from Professor Ernest van den Haag's article "New Arguments Against Capital Punishment" which appeared in *National Review* magazine, Feb. 8, 1985, p. 33.]